***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

ORIGINAL

76-1362

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P/S

# United States Court of Appeals
# For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

CHEUNG KIN PING,

Defendant-Appellant.

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## BRIEF ON BEHALF OF APPELLANT CHEUNG KIN PING

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## PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered the 26th day of July, 1976 in the United States District Court for the Southern District of New York, Honorable Charles L. Brieant presiding. As a consequence of appellant's conviction by a jury, he was sentenced to a term of imprisonment of seven (7) years for conspiring to violate the narcotics laws of the United States (old law), and to a term of imprisonment of seven (7) years, together with a three (3) year special parole for violating Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and a suspended sentence and placed on probation for a period of six (6) months for violating Title 21, United States Code, Section 843(b), all sentences to run concurrently.

## QUESTIONS PRESENTED

1. Was the prosecution barred by the Fifth Amendment proscription against double jeopardy?

2. Were admissions purportedly made by appellant received into evidence without a hearing where the evidence disclosed that they were extracted after a request for an attorney improperly admitted?

3. Did a pre-trial delay which resulted in the loss of witnesses severely curb appellant's ability to defend himself?

4. Were comments in the Court's charge answering appellant's counsel's closing arguments proper?

5. Did testimony of protection for non-existent threats to government witnesses so inflame the jury as to obviate a fair trial?

## THE FACTS

### PRIOR PROCEEDINGS:

Appellant was arrested April 5, 1972 and remained in custody until December 7, 1973 when an order of the United States Court of Appeals for the Fifth Circuit dismissed an indictment pending against appellant in the United States District Court for the Southern District of Florida after appellant had undergone two trials -- an aborted first trial which was the basis for the Court of Appeals dismissal for double jeopardy, 485 F. 2d 689 (1973). In July, 1975 appellant was again arrested. He was charged this time with conspiracy and various narcotics violations under the old and new narcotics laws. Set forth as overt acts in the conspiracy count were the very transactions for which appellant was tried in the Southern District of Florida where the indictment was dismissed (A 94)*

### THE TRIAL:

Yuin Kwei Sang operated as a narcotics importer until his arrest in Hong Kong in October of 1972 (114)**. After he successfully fought extradition, Yuin was again arrested March 15, 1974 -- this time

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* "A" refers to pages of the appendix.
** Refers to pages of the trial transcript.

extradition was granted, resulting in Yuin's arrival in the United States November 1, 1974 in the company of special agent Jack Taylor -- who in the trip across the Pacific recruited another soldier in the war against narcotics (118, 119, 185, 196-99, 526). Seven thousand dollars ($7,000.00) Dollars, the bringing of Yuin's family to the United States, and promises of permanent legal residence for Yuin and his family plus relocation and employment were sufficient persuasion. As consideration for this cooperation, the government settled for a plea of guilty to one count of the indictment with the possible punishment of 0 - 15 years while appellant and his co-defendant were tried on an indictment charging seven (7) counts, including both the new law and the old narcotics law with a mandatory minimum sentence of five (5) years and possible consecutive sentences (120, 121, 124, 125, 472, 475, 476, 481, 516-19, 526).

Yuin fulfilled his part of the bargain by doing everything needed -- which involved testifying that he, a sophisticated narcotics dealer -- having by his own admission sold at least four pounds of heroin in 1968 within two months after his arrival into this country for employment as a chef, and 2 1/2 pounds in 1969 -- enlisted the aid of an amateur, Lai Mong Wah (Gloria), the co-appellant herein, and someone he knew only from meeting at a Mah jong club, appellant -- to aid him in the narcotics business (17, 19, 22, 29, 88, 128).

According to Yuin, the Mah Jong parlor was the scene of his first meeting with Gloria* and Chang Yu Ching** (22). It was Chang who proposed that Yuin ante up $1,500 to go into the narcotics business in a three-way partnership between Chang, Gloria and Yuin (29, 30). This accomplished, Chang left for Hong Kong with a big sendoff from Gloria, her husband George Yip, Sammy Cho and Loh Rah Dee -- seeing Chang and his wife off (30).

Letters began arriving from Chang setting forth the mode of shipment -- through seamen (32, 33). Gloria, then part owner and barmaid of the Golden Star, was kept abreast of developments (32, 34, 1010, 1011). When the shipment did arrive, arrangements to retrieve it from a ship docked in Staten Island were made at the Golden Star. Yuin's trial version had Gloria and two young men drive him and a seaman to Staten Island -- the grand jury version had only himself, Gloria and the seamen retrieving the narcotics packed in a carton -- grand jury testimony; two cartons -- trial version. (36-42, 142, 143, 145, 146). After extracting 20 ounces of white powder and 60 to 70 ounces of brown powder from the cartons, Yuin first stashed them at his home, a cooperative at 80 First Avenue. Then he rented an apartment in a run-down tenement across the avenue at 133 East 4th Street to use as a

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* Referred throughout the record as Gloria.
** Indicted but never arrested.

warehouse (42-45). Although Yuin admitted to securing the apartment for this narcotics warehouse, it was his testimony that Gloria selected the apartment and he rented it for the partnership (45, 46, 135-37). Gloria's memory of this apartment, relates to her being threatened there -- her life and her husband's life -- unless she complied with all of Yuin's commands (1004, 1007).

With pounds of narcotics in the warehouse a buyer materialized in the form of Dr. Lui from Washington, D. C. (46). Dr. Lui placed a telephone call from Washington, D. C. based on an examination of samples received from Yuin in New York (51, 52). Yuin bused to Washington, D. C. (53). There he met a friend, Sung Win Tuck who chauffered him around Washington, D. C. -- first to the Woodner Hotel where Dr. Lui had an apartment, and then around Washington, D. C. sightseeing returning later to the Woodner (54, 55, 285, 286, 313, 314). According to Yuin an additional stop was made at the bus terminal permitting him to take the narcotics out of a locker in which he had placed them on arrival (194). Sung's testimony does not relate this stop; nor an episode testified by Yuin where a black man drove him a few blocks in a strange city and he found his way back to Sung's car minus the bag containing the narcotics (56, 57). Sung merely saw Yuin enter the Woodner Hotel and when he returned to the car he still was in possession of the carrier he had with him upon his arrival in Washington,

D. C. (287, 288, 303, 306). Yuin then asked to be driven to the Peking Restaurant to see a friend (285). At this restaurant, according to Yuin, he was paid $15,000 by Dr. Lui (57). By this time it was 9 o'clock and Yuin wished to return to New York, declining an offer by his friend to stay at his home in Alexandria, Virginia and returned by Greyhound Bus (288, 289).

Back in New York, Yuin told Gloria that he sold the "white stuff" and divided the profits $2,000 each -- purchasing money orders at the Bank of North America which Yuin gave Gloria to send to Chang (58, 59, 62). The remainder of the inventory was sold, 25 ounces to an unknown purchaser by Yuin--for an undisclosed amount to Sandy -- with Gloria selling a pound to Lee Louie for $4,000 (64-8). Chang acknowledged receipt of the money and informed Yuin of a new shipment secreted in coffee tables in letters destroyed by Yuin (70-2).

Eight (8) pounds of narcotics -- Yuin's trial version, five (5) pounds his grand jury version -- were removed by Yuin from a coffee table brought to the narcotics warehouse at 133 East 4th Street by a seaman who was paid $1,000 for his services (73-5, 83, 138, 140). Unwrapping the tables took two (2) days and two (2) more days to dismantle them (75-7). When Po Leung, Dr. Lui's bodyguard, arrived from Washington, D. C. to make a purchase in August of 1971, only 8 ounces remained of the 8 pounds shipped in July, 1971 (83, 86, 87).

However, Yuin's trial testimony does not mention any sales between July and August of 1971. Nonetheless, Yuin sold his last eight ounces to Dr. Lui, entrusting the narcotics and the collection to appellant whom he had met only weeks earlier at a Mah Jong parlor (87, 88). Payment for the sale was made to Yuin's friend Sung in Virginia who went to Dr. Lui's restaurant to collect the $26,000. Sung turned the money over to a mutual friend Loh, who was staying at the narcotics warehouse at 133 East 4th Street (89, 288, 290). The money was then given to Yuin (89). Sometime later appellant gave Yuin $1,000 that according to Yuin appellant received from Dr. Lui. For his trouble, appellant was rewarded with $500.00 -- a gratuity (89).

The fall of 1971 brought a new customer, Larry Lombardi (90). As related by Yuin he was introduced by Mr. Lombardi by Gloria. A half a pound of heroin and then a kilo of heroin was sold to Mr. Lombardi (there was no testimony of a new shipment) (91). It was Mr. Lombardi who demonstrated to Yuin, a narcotics dealer for three years, how to test for pure heroin by boiling in oil (92). Payment for the heroin followed (93).

Later in the fall of 1971 Yuin became Sammy Cho's* narcotics distributor (93). Cho had 15 pounds -- five pounds were kept at 133 East 4th Street -- this plus part of the stash (no new shipments recorded) were sold to Lombardi (94). The remaining ten pounds was

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* An indicted but not arrested defendant.

purchased from Sammy Cho for $90,000 out of past profits (94). This was sold to Lombardi for either $15,000 or $16,000 a kilo (94). At least $20,000 to $30,000 in cash was always kept at 133 East 4th Street (95). At about this time Sammy Cho offered Yuin a partnership and 20 pounds of heroin. Yuin declined because of insufficient funds (96). However, a portion was purchased by Yuin and sold to Lombardi (96, 97). In that same month, October of 1971, Yuin met Special Agent Jack Taylor, masquerading as a narcotics dealer through a DEA informer named Sammy (97). Two sales -- one ounce and a half a pound were made to Special Agent Taylor as other agents of the DEA looked on (97, 357-60, 446-55, 457-60).

By December, 1971 when Yuin left for Hong Kong with his wife, the entire inventory of narcotics was depleted and the profits divided -- $30,000 each to Yuin, Chang and Gloria (97). Since both Chang and Gloria were in Hong Kong -- Gloria leaving November, 1971 -- Yuin sent money orders -- the purchase of some of these observed by agents of the DEA (98-100, 361, 363, 364). Yuin related how he filled in the payees in different names and sent them to Hong Kong to Gloria and Chang (101, 103). Gloria acknowledged the receipt of the money orders -- relating how she was forced to cash or deposit them by Yuin and never received a penny, turning the proceeds over to Yuin (1022, 1032).

It was also before his departure for Hong Kong that Yuin permitted appellant to apply for a loan in Yuin's name, listing Yuin as the lender and appellant as co-maker -- rather than lending appellant the same $3,000 (104-06). Yuin testified to receiving $3,000 from the bank, depositing it in his checking account and making out a personal check for $3,000 to the order of appellant (107).

And it was appellant's American Express card, according to Yuin that purchased Yuin's tickets to Hong Kong. Yuin testified that he reimbursed appellant the $1,000 for these tickets (107, 385, 386).

With the shift of scenes to Hong Kong -- Sammy Cho, appellant, Loh Ah Dee, Ka Chang Fu, Gloria and Yuin formed a joint venture; each purchasing 25 ounces of narcotics to be distributed in the United States (105-15). After some negotiations Ting Yu Fong agreed to carry the narcotics to the United States aboard a ship named the Laomendon (600-07). Arriving in Miami Harbor, customs officer Frank Torres observed the transfer of a case from the ship to the trunk of Sammy Cho's automobile (167-72). Appellant, Sammy Cho and the seaman Ting were arrested (573, 574, 613-17). Appellant using Sammy Cho as interpreter, identified Ting as the deliverer of the case (761-66).

Throughout two trials and a grand jury appearance in the Southern District, Ting completely exonerated appellant. Ting's testimony only implicated Sammy Cho as the shipper of the narcotics

(694-709, 712-739A99-A133A ). It was only at this trial that appellant became the recruiter, the object of a telephone call to New York (not to speak to Cho as he testified in the three previous proceedings) (600-07, 609-11, 613, 640, 649-53, 655, 656, 659, 662). Ting's present version was that appellant promised his family $200.00 a month if all blame were first shifted to Gloria and Yuin and then changing to Sammy Cho (619, 620, 626, 627). It was because of this offer that Ting lied -- he was threatened with a perjury prosecution. However, Ting maintained before the Southern District Grand Jury in this matter after he had corresponded with his family who had not received anything from appellant that Sammy Cho was the shipper (681-82). And in a letter to the authorities Ting offered to continue assisting in narcotics prosecutions of Cho and others; nary a mention of appellant except that appellant asked him to take some clothing to the United States that would be overweight on the airplane (673-80). However, with lawful residence in the United States, a job paying $650.00 a month as opposed to $180.00 a month as a seaman, and a promise of permanent residence with his family being shipped to the United States at the government's expense -- Ting changed his story (677, 691).

A refreshing of the memory, according to William Mason, a customs agent, was the reason for modification in his testimony. When

he was confronted with previous testimony that appellant had requested an attorney he now remembered that his testimony that appellant did not wish an attorney was in error (830, 833-35, 852, 857). That appellant requested an attorney between 1 and 2 A M. was testified to by Customs Officer Larry Morphis. However, according to official reports, appellant was questioned until 4:30 A. M. (856). This questioning subsequent to appellant's request for an attorney elicited references to a Ying or Yung to whom appellant said he owed money and that this Ying or Yung requested appellant go to Hong Kong to recruit someone to take something dangerous to the United States (818, 819, 850, 851). These purported statements were not recorded or taken in shorthand despite the language difficulty and the presence of recorders (801, 824). At the conclusion of this 4 1/2 hour interview -- 3 hours after appellant requested an attorney -- Customs Officer Morphis was able to observe appellant dial first Yuin's telephone number and then Gloria's (852).

## POINT I

## APPELLANT'S PROSECUTION WAS BARRED BY THE FIFTH AMENDMENT'S PROSCRIPTION AGAINST DOUBLE JEOPARDY.

After spending two years in a federal penitentiary, appellant's Florida prosecution for importing narcotics was dismissed. One year after his release, appellant found himself faced with defending a conspiracy charge based on the same acts that resulted in his imprisonment and the subsequent dismissal of the indictment. The only change was a charge of conspiracy and a telephone count included in the instant indictment. As for the testimony -- although Yuin was not available for the Florida trial -- Yuin's testimony concerning appellant at this trial related merely to the circumstances preceding the seizure of narcotics at the Miami docks for which appellant and Sammy Cho were prosecuted in Florida, and a meeting in Hong Kong resulting in a joint venture which included appellant, Gloria (co-appellant), Sammy Cho, Ka Chang Fu and Lo Ah Dee. Only Yuin's testimony of a loan taken in Yuin's name for appellant and appellant's presence with Po Lueng when Yuin entrusted appellant with eight (8) ounces of heroin for Dr. Lui and appellant paid Yuin $1,000 were added to the testimony received at the Florida trial -- evidence of mere casual facilitation. See United States v. Torres, 519 F. 2d 723 (2nd Cir. 1975).

Havin failed to charge a conspiracy in the Florida trial, the governmen corrected this oversight by charging conspiracy in the instant indictment. Thus the entire script of appellant's Florida trial was replayed to a new audience under the guise of evidence of conspiracy. That there was sufficient evidence of an illegal agreement to import narcotics in the testimony before the Florida court as supplied by appellant in a series of admissions extracted by the authorities held admissible in the Florida court -- did not deter the present prosecution. Now this prosecutor seeks an advantage for the Florida prosecutor not having charged conspiracy.

Certainly the United States Attorney for the Southern District of Florida had in his possession at the time of the appellant's indictment in that District sufficient evidence to warrant an indictment for conspiracy. This is substantiated in the testimony before the Florida court where a series of admissions extracted from the appellant by the authorities were ruled admissible by the United States District Judge presiding at the trials in the Southern District of Florida. Not deterred by this, the United States Attorney seized the advantage resulting from the failure of his Florida counterpart to allege conspiracy.

This Court has taken a "common sense" approach in deciding whether a prosecution is barred by the Fifth Amendment -- double jeopardy clause. As stated in United States v. Cala, 521 F. 2d 605, 608 (2nd Cir. 1975):

> " In determining what issues were necessarily resolved by the prior proceedings, the courts take a practical approach, examine the record, pleadings, evidence and jury instructions in order to decide 'whether a rational jury could have founded its verdict upon an issue other than that which defendants seeks to foreclose from consideration'. "

Thus when an issue of ultimate fact has been decided a re-trial on that fact is barred. See United States v. Seijo, F. 2d (2nd Cir. 1976, 75-1377).

"Applying a strict evidence test in the context of criminal conspiracy" places an awesome discretion in the hands of the prosecutor after a prior failed prosecution. United States v. Bommarito, 524 F. 2d 140, 146 (2nd Cir. 1975).

Not only would the evidence admitted at the Florida trial support a conviction in the Southern District and vice versa, it actually did. Appellant was convicted on essentially the same evidence presented to the Florida jury, only the exact charges were altered to suit the exigencies of the prosecutor. Unlike United States v. Papa, 533 F. 2d 815 (2nd Cir. 1976); United States v. Ortega-Alvarez, 50[illegible] F. 2d 455 (2nd Cir. 1975); United States v. Nathan, 476 F. 2d 456 (2nd Cir. 1973), where double jeopardy claims were advanced in cases encompassing extended narcotics dealings over many years involving many suppliers and purchasers where pleas of guilty taken in other courts only related to one small portion of these extensive dealings -- here the charged conspiracy involved appellant

for less than a year in essentially one transaction: the April 5, 1972 importation -- which was dismissed by the Court of Appeals for the Fifth Circuit.

## POINT II

ADMISSIONS PURPORTEDLY MADE BY APPELLANT WERE RECEIVED IN EVIDENCE WITHOUT A HEARING WHERE THE TESTIMONY DISCLOSED THAT THEY WERE EXTRACTED FROM APPELLANT AFTER HE HAD REQUESTED AN ATTORNEY.

Appellant was denied a hearing as to the admissibility of reported admissions extracted after his arrest in Miami, Florida. The trial court based its refusal to hold a hearing on a previous denial of appellant's application to suppress these admissions after a hearing held in the United States District Court for the Southern District of Florida. In its decision the Court assumed the irregularity of the Florida proceedings -- holding that it was collaterally estopped from considering the matter anew (A 96, A 97).

In this, the Court misconstrued the doctrine of collateral estoppel as applied by the Supreme Court in Ashe v. Swenson, 397 U.S. 436 (1970). There the doctrine was applied in favor of an accused who faced multiple prosecutions for a mass robbery after he had been acquitted of robbing one victim. The guarantees of the Fifth Amendment double jeopardy clause did not permit a re-trial of the first prosecution; the prosecutor was not permitted a second chance with another victim until eventual conviction.

Nowhere in Ashe v. Swenson does the Supreme Court even hint that collateral estoppel (res ajudicata) would be applied to restrict an accused's right to suppress admissions extracted in violation of Miranda v. Arizona, 384 U.S. 436 (1966). To the contrary it would be

the Court's obligation to suppress such a confession; civil rules of evidence not withstanding. Without setting forth the entire history of the double jeopardy clause -- it could be safely said that it was made part of the United States Constitution, as were the other items of the Bill of Rights -- to protect the individual against the tyranny of government, not to deprive an accused of a right guaranteed by the Constitution; another portion of the Fifth Amendment -- the proscription against self-incrimination as interpreted by the Supreme Court in Miranda v. Arizona, supra.

Constitutional questions involving the Fifth Amendment's self-incrimination clause can never be said to be final. See Fay v. Noia, 372 U.S. 393 (1963). Collateral attack has long been permitted for Fifth and Sixth Amendment rights. Kaufman v. United States, 394 U.S. 217 (1969). The recent Supreme Court decision of Stone v. Powell, U.S. (1976), 19 Cr. L. 3233, does not alter a trial court's ultimate responsibility from excluding evidence procured in violation of the United States Constitution. When it developed during the course of this trial that admissions attributed to appellant were extracted after a request for an attorney, suppression was constitutionally mandated. Any doubt as to the circumstances of these admissions could only be resolved by a hearing. And there being an absence of proof in the record in the Florida District Court that the denial of a motion to suppress was a final decision "supported . . . with a reasoned opinion, [and] that the decision

was subject to appeal or was in fact reviewed on appeal," the Court is obligated to consider appellant's application to suppress the purported admissions de novo. United Statex ex rel. DiGiangiemo, 528 F. 2d 1262(2nd Cir. 1975).

## POINT III

## PRE-TRIAL DELAY RESULTING IN THE LOSS OF WITNESSES SEVERELY CURBED APPELLANT'S ABILITY TO DEFEND HIMSELF.

Appellant was known to the authorities as early as April 5, 1972 when he was arrested in Florida. Yuin merely supplied further information implicating appellant in narcotics trafficking. Therefore, any delay after November, 1974 when Yuin began cooperating with the authorities, until June 23, 1975 when this indictment was filed, is a violation of the appellant's due process rights. Potential witnesses -- Sammy Cho disappeared after being released from the Florida charge, and Dr. Lui who died in February of 1975 were lost to appellant. This is not merely a "possibility of prejudice". It is actual prejudice. United States v. Podrell, 523 F. 2d 886 (2nd Cir. 1975).

This was not a complicated stock fraud prosecution where the government was sifting the evidence to protect the innocent as well as those the prosecution thought to be guilty. United States v. Finkelstein, 526 F. 2d 517 (2nd Cir. 1975). It was a simple narcotics conspiracy based on the testimony of an accomplice who claimed to be familiar with the operations of the conspiracy. Once the authorities had Yuin's statement they had their case. Verification and documentation went only to strengthen it against the others named in the indictment. As to appellant, the case against him was contained in the minutes of the

United States District Court for the Southern District of Florida. The eight (8) month delay operated to damage him irreparably; losing two witnesses.

## POINT IV

## COMMENTS IN THE COURT'S CHARGE ANSWERING APPELLANT'S COUNSEL'S CLOSING ARGUMENTS WERE IMPROPER.

In the closing argument, appellant criticized the government largesse regards cooperating narcotics traffickers (A134, A135). For whatever reason -- the prosecution chose not to spend much time answering this criticism in rebuttal.

However, the court took up the government's cudgels.

> " Now a word about the witness Yuin Kwei Sang, also referred to as George Yuin and Ting Yee Fong, who were called by the government as witnesses at the trial. By their own testimony, Yuin and Ting Yee Fong were accomplices in the crimes charged against the defendants on trial and in the prosecution of crime, the government is frequently called upon to use accomplices as witnesses. Often it has no choice because the government must rely on such witnesses as to transactions as there may be and it's not frequent that prople of impeccable reputation are witnesses to and participants in criminal endeavors. The government frequently must use such witnesses otherwise it would be difficult or impossible to detect or prosecute wrong-doers. There is no requirement in the federal courts that the testimony of accomplices be corroborated. The conviction may rest upon the uncorroborated testimony of an accomplice if you believe it and find it credible." (1198)

After cautioning the jury that such accomplices' testimony should be treated with care, the Court stated:

> " Now, it's also permissible for the government to arrange for special benefits for accomplices who become cooperating individuals and this can

> include provisions for their financial support, that of their families, in obtaining new employment for them in a different place, attempting to prevent their deportation to Hong Kong or arranging to bring the wife to the United States in Hong Kong. All of these procedures are permissible. However, there is the possibility that such benefits conferred upon a self-admitted criminal might create a bias on his part in favor of the government or be an inducement to testify falsely. So these matters are proper matters for your consideration in weighing the testimony of Ting Yee Fong and George Yuin, along with all the relevant evidence in the case." (1199, 1200).

It was the prosecutor's responsibility or choice to make these arguments and not the Court's. All that was required in this context was that the testimony of accomplices should be treated with care. All comments on the necessary use of accomplices and the government's gratitude were arguments for counsel, as was the direct allusion to defense counsel's argument.

Compounding these prosecutorial comments was the Court's missing witness charge:

> " Now, there is no duty on the government to call witnesses to produce evidence which is usually available to both sides. Specifically, the government has no duty to call Keung, the Florida restaurant owner who was said to have acted as an interpreter and the bank records of George Yuin to the extent that they exist are equally available by subpoena to both sides. Any party to the case can go to the bank and obtain copies in that fashion by issuing a subpoena which is signed by the Clerk of the Court, although as I mentioned to you

> earlier, no defendant need prove anything and the burden of proof is always on the government and the defendant is not required to bring in any evidence, but the point I wish to make at this time, you are to decide the case on what was brought before you and the weight of evidence and you may consider the absence of that evidence but you may not speculate as to what some witness who is not called may have testified to, or what some document which was not brought in may have shown if the document or the witness is equally available to both sides and no inference adverse to the government results from its failure to call such equally available witnesses or bring in equally available documents, nor need the government bring in witnesses whose testimony would have been merely cumulative. In the latter category, you may consider that Cascavilla, the other customs agent in Florida, would have been merely cumulative of the testimony of agents Mason, Csukas or Morphis and under these circumstances, there was no need to bring in agent Cascavilla, if you find that to be so." (1203, 1204).

This pointed type of argument as to what the government did or did not prove as raised by counsel was severely criticized in United States v. Brown, 511 F.2d 920, 925 (2nd Cir. 1975). In effect, the Court was removing from the jury their function in determining whether the government had proved their case beyond a reasonable doubt by failure to introduce evidence. Of course this is impermissible. Continuing the court argued as follows:

> " Now there has been testimony from the government witness Ting Yee Fong that following his arrest with the defendants Cheung Kin Ping and Sammy Cho, the

> defendant Cheung Kin Ping asked Ting Yee Fong to fabricate a false story as to Cheung Kin Ping's role in the importation of the heroin seized in Miami at the time of the arrest. The government contends, and of course it's for you to determine, that there has been testimony and documentary evidence before you tending to show that the story that Cheung Kin Ping wished Ting Yee Fong to tell and which in fact Ting Yee Fong did in fact tell was false. If you find beyond a reasonable doubt that Cheung Kin Pink told Ting Yee Fong to tell this story and you find that this story was false and that at the time Cheung Kin Ping told Ting Yee Fong to tell it that it was false and he knew it, then you may consider such facts as circumstantial evidence of consciousness of guilt and therefore, as evidence of guilt in and of itself.
>
> " Ordinarily its reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or a statement tending to establish his innocence. Whether or not evidence as to such an explanation or statement points to a consciousness of guilt and the significance if any to be attached to such evidence, are matters like all fact matters solely for your consideration. " (1204, 1205).

Again the Court was usurping the jury's function by pointing to certain evidence and arguing that this in effect is of greater significance than other evidence. A poignant reference to human nature was also included in the charge which in effect usurped the jury's function in using its own experience. These comments exceeded the limits of fair judicial comments on the evidence.

> " When a judge becomes an advocate . . . he exceeds his jurisdiction. "
> United States v. Carter, 528 F.2d 844 (8th Cir. 1975).

Therefore, it was impermissible for the Court to don the robes of an advocate when it charges as follows:

> " In summation, one of the attorneys told you that a verdict of guilty would be a stamp of approval with respect to the practices of the Government in its dealing with informers, accomplices or cooperating individuals who testify to their prior criminal dealings and implicate others.
>
> Members of the jury, these great issues of law enforcement policies are not your concern in this case. There is nothing improper about the use of the testimony of accomplices, although, as I instructed you earlier, their testimony must be evaluated with care. This has been done for centuries in this country and it is nothing new. By giving a verdict here, you are not asked to determine whether or not you agree with the policies or the laws relating to the use of testimony of accomplices or cooperating individuals.
>
> Putting it another way, if you are satisfied beyond a reasonable doubt that a defendant committed the offense charged in a particular count of the indictment, then you must find that defendant guilty. The proof must satisfy you beyond a reasonable doubt, but that proof may be supplied wholly or in part by a person who was an accomplice, a co-conspirator or a cooperating individual.
>
> The Government wins a case whenever justice is done. If justice requires an acquittal, that is your duty, and the counterpart of that statement is equally true.
>
> Please focus your attention on the real issues in this case and decide them and if, as you were asked in summation by one of the lawyers, you want to send a message to the powers that be, then when the case is over write to your congressman, but don't let that desire to send any message affect you in the meantime in the performance of your sworn duty."
> (1257-59)

See also United States v. Araujo, F. 2d (2nd Cir. 1976) (No. 76-1085), where this Court held that isolated ill-conceived comments on the evidence were not such an abuse of discretion as held impermissible in Quercia v. United States, 289 U.S. 466 (1933).

In the instant case the Court comments on the evidence were not isolated but permeated the entire charge. See, United States v. Natale, 526 F. 2d 1160 (2nd Cir. 1975).

## POINT V

## TESTIMONY OF PROTECTION FOR NON-EXISTENT THREATS SO INFLAMED THE JURY AS TO OBVIATE A FAIR TRIAL.

During cross-examination of Yuin he blurted out:

> "Q. You like it here in the United States, don't you, Mr. Yuin?
> A. Now that I have become a witness here, it would be very dangerous for me to return to Hong Kong.
> Q. It would be.
> A. It would be.
> Q. Otherwise you wouldn't care whether you went to Hong Kong or not?
> A. That's correct. I feel that after I have become a witness here, even if I stay on here, there will be danger to me, too.
> Q. Dangerous to you, you have been threatened in this case haven't you?
> A. Not at present, yet.
> Q. Nobody has come near you, have they?
> A. No."
> (142, 143)

Seizing on this golden opportunity, the prosecutor on re-direct questioned the witness Yuin.

> "Q. Prior to your wife's coming here, had she been threatened?
> The Court: Had she told you that she had been threatened?
> Q. Fine. Had she told you that she had been threatened?
> A. There was.
> Q. When had she told you that she had been threatened?
> A. During one of our long distance telephone calls.
> Q. And do you remember what there was, when that was, approximately?
> A. Approximately around July.

Q. Of what year?
A. Last year.
Q. And what did she say about the threats?

* * *

Q. There were threats that your wife reported to you? Mr. Yuin, to you, threats, Mr. Yuin, physical threats, against her?
A. Threatened by telephone calls. The person called by phone and threatened her.
Q. Were their threats upon her physical wellbeing?

* * *

The Court: . . . Did these telephone calls -- did she tell you that the nature of these telephone calls was -- what the threats were? [sic]

The Witness: She said the matter has already been in the newspapers -- that the persons that called. The newspapers here have already announced it here. And also in the news . . . " (243)

There was an objection -- it was sustained -- however, the jury had already heard that. Continuing along this vein:

"Q. The telephone threats that your wife received and that you were told about by your wife --
A. She told me on the telephone.
Q. --- were these threats against her wellbeing?
A. That all the news that you are giving to the American government is very dangerous for me."
(277-79)

Yuin's unfounded fears of a need for protection from unknown sources was buttressed by Ting on direct examination:

"Q. Have you been made any other promises?
A. Yes.
Q. What?
A. That in the event if I don't tell the truth. then the government at that time can prosecute me.
Q. Have there been any other promises?
A. Yes.
Q. What was that?
A. If there should be a threat to my life, the government promised to protect me and I cannot return to Hong Kong now because of the danger that I face. . . .
Q. Has the government, finally, made any promises with respect to your family, Mr. Ting?
A. If there should be threat directly to my family in Hong Kong, the government promised to give them protection and perhaps help them to come over here."
(628, 629)

With this the spector of violence was injected into a trial where no hint of such violence existed.

Even a most astute jury must wonder at the prosecutor's and his witnesses continuous references to protection. This could lead to only one conclusion: that the prosecutor knows something more than the jury is getting in regard to threats and violence. And if he and his witnesses are continually harping on protection, the witness must be in danger -- from appellant. See, United States v. Burse, 531 F. 2d 1151 (2nd Cir. 1976).

## POINT VI

APPELLANT ADOPTS ALL POINTS OF THE OTHER APPELLANT WHICH ARE APPLICABLE.

## CONCLUSION

APPELLANT'S CONVICTION SHOULD BE REVERSED, THE INDICTMENT DISMISSED, OR IN THE ALTERNATIVE A NEW TRIAL ORDERED.

Respectfully submitted,

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ROSENTHAL & HERMAN

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of Sept. , 19 76 at No. 1 St. Andrews Pl., NYC deponent served the within Brief upon U.S. Atty., So. Dist. of N.Y. the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 24 day of Sept. 19 76

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978